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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1975

No. 75-377

RICHARD I. LUDWIG

Appellant

V.

COMMONWEALTH OF MASSACHUSETTS

Appellee

ON APPEAL FROM THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

APPELLANT'S REPLY BRIEF

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ARGUMENT

I - MASSACHUSETTS' "SUGGESTION" THAT THIS COURT LACKS JURISDICTION OVER APPELLANT'S APPEAL IS PATENTLY WITHOUT MERIT.

In its brief and under a section denominated "Jurisdictional Statement", Massachusetts maintains this Court lacks jurisdiction

over Ludwig's appeal because there is no case or controversy. The basis of this contention is that Ludwig waived his right to a jury trial in his second tier criminal proceedings. From this, Masschusetts argues that Ludwig "has no personal interest in receiving a jury trial, thus raising a serious question as to whether this case comes before this Court as a result of the appellant's interest in the case or as a result of the attorney's interest in obtaining an advisory opinion of this Court as to the constitutionality of the two-tier system". Moreover, Massachusetts asserts that the case is more "'feigned' than actual".

In reply to this argument, insofar that it relates to this Court's jurisdiction, the controversy in question is the sentence of $20 imposed by the District Court of Northern Norfolk Six-

Man Jury.[1] The controversy is a "live" one since payment of the fine has been stayed (App. 2a). Far more important, however, are the collateral consequences which attach to a conviction under G.L. Ch. 90 §24(2). In particular, Ludwig was previously convicted on November 3, 1972 for driving to endanger. If this conviction is sustained and if Ludwig is convicted of any motor violation set forth in Massachusetts' Habitual Traffic Offender statute, G.L. Ch. 90 §22F, before November 3, 1978 or of any two violations before March 11, 1979, his driver's license will be revoked for a

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1 Ludwig's license was revoked under G.L. Ch. 90 §24(2)(b), but has since been reinstated pursuant to the discretion invested in the Registrar under Ch. 90 §24(2)(c). However, the record of his revocation still affects his ability to obtain non-statutory automobile insurance or a job involving driving.

period of four years.[2] Of such a consequence, Justice Powell observed in his concurring opinion in Argersinger v. Hamlin, 407

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2 G.L. Ch. 90 §22F compels the Registrar of Motor Vehicles to revoke the license of habitual traffic offenders for a period of four years, but allows the Registar in his discretion, if hardship exists, to issue a new license on a limited basis one year after revocation. A habitual traffic offender is one who incurs three convictions within a five year period of any of the following offenses, singularly or in combination: 1) driving under the influence of intoxicating liquors or narcotic drugs; 2) operating a motor vehicle recklessly or negligently; 3) making a false statement in an application for a motor vehicle operator's license or for registration of a motor vehicle; 4) leaving the scene of accident without making oneself known; 5) operating a motor vehicle after suspension and 6) operating without a license. The full text of Ch. 90 §22F is set out in the appendix to this reply brief.

U.S. 25, 48 (1972): "Losing one's driver's license is more serious for some individuals than a brief stay in jail."

Although what has been said above is sufficient to dispose of the contention that Ludwig has no personal stake in the outcome of this case, this counsel is constrained to comment briefly on Massachusetts' unsupported allegations concerning his personal interest in this litigation. Since becoming aware of the rule of Callan v. Wilson, 127 U.S. 540 (1888), this counsel has claimed a right to trial by jury in the first instance on behalf of almost every accused who has been charged with offenses carrying heavy collateral consequences upon conviction in a first tier court or where there has existed a close issue of reasonable doubt on the merits of the case.[3]

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[3] In Ludwig's case, conviction in the first tier court carried a mandatory license revocation, G.L. Ch. 90 §24(2)(b). Additionally, there existed a close issue of reasonable doubt.

In either of these situations, this counsel believes that a trial by jury in the first instance was in the best interests of the accused, and as such, he felt compelled by duty as an attorney to assert this right. Where a satisfactory disposition of the criminal charges has not resulted, this attorney has sought state and federal review of the first tier court's denial of a trial by jury. How or why this course of duty should be interpreted as this "counsel's interest alone in obtaining an advisory opinion" - other than to state the proposition - is left unexplained by Massachusetts in its brief. As such, Massachusetts' allegations are not only unjustified but unwarranted.

II - MASSACHUSETTS IS PRECLUDED FROM RAISING ANY WAIVER DEFENSE BY ITS FAILURE TO RAISE THE ISSUE BELOW, BUT EVEN IF IT IS NOT, ITS CONTENTIONS ARE WITHOUT MERIT.

The substance of Massachusetts' waiver argument, insofar as it relates to the merits of the controversy, is that Ludwig

waived his right to complain of his being denied a jury trial in the first tier proceedings by subsequently waiving his right to a jury trial in the second tier proceedings. Although this defense, if indeed it is one, could have been raised below, Massachusetts chose not to present it in the trial court upon Ludwig's bill of exceptions, nor before the Supreme Judicial Court on appeal, nor before this Court in its motion to dismiss for lack of a substantial question.[4] Hence, it should be precluded from raising the issue at this late hour.

Quite apart from this consideration, Ludwig maintains that Massachusetts' waiver defense, whether viewed under state or

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4 Counsel for Massachusetts maintains on page two of her brief that she just recently became aware of this fact. Needless to say, Massachusetts is bound by the conduct of the five attorneys who previously represented it in this matter.

federal law, is without merit. First, it should be observed that the Supreme Judicial Court passed on the subject constitutional issues notwithstanding the fact that Ludwig waived his right to a jury trial in the second tier proceedings. Clearly, the inference here is that as a matter of Massachusetts law, Ludwig was not precluded by his second tier waiver from seeking review of the denial of his right to a jury trial in the first tier proceedings. Cf. Lefkowitz v. Newsome, 420 U.S. 283 (1975).

Secondly, if "substantive federal constitutional law"[5] is applied, the same result must hold. More specifically, Ludwig's relinquishment of his jury trial right in the second tier proceeding was not an intentional or express waiver of his right to federal review of the denial of his motion to dismiss, but rather, in fact, it was designed to preserve his federal claim

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5 Lefkowitz v. Newsome, supra (White dissenting).

against mootnes. Cf. Costarelli v. Massachusetts, 421 U.S. 193 (1975).[6] Indeed, as far as that portion of Ludwig's motion to dismiss which was based on the defense of double jeopardy is concerned, it is difficult to imagine any action short of failure to appeal or a "diliberate by pass" which could be interpreted as a "'break in the chain of events'" to prevent federal review in this Court, Lefkowitz v. Newsome, supra, 290 ftn. 6, quoting Tollett v. Henderson, 411 U.S. 258, 267, (1973). See also Menna v. New York, ___ U.S. ___, Nov. 17, 1975. Accordingly, Ludwig submits that his waiver of a jury trial in the second tier proceedings can in no way be interpreted either under state or federal law as a waiver of his right for state or federal review of his constitutional claims.

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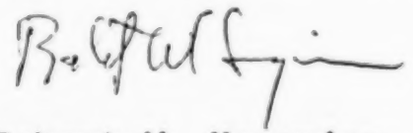
6 Ludwig's second tier trial preceded this Court's decision in Costarelli v. Massachusetts, 421 U.S. 193 (1975).

CONCLUSION

In light of the above, Ludwig submits that Massachusetts' legal contentions are without merit and its unsupported allegations are without justification.

Respectfully submitted,



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APPENDIX

G.L. Ch. 90 §22F reads in part:

A person shall be deemed an habitual traffic offender when records maintained by the registrar show that such person has accumulated the following convictions within a five-year period; provided, however, that when a person who has no prior record of an automobile law violation, as defined in section one of chapter ninety C, is convicted of more than one of the violations referred to in this section, if such offenses all occurred within a six-hour period, such convictions shall for the purposes of this section be treated as a single conviction: 1) three or more convictions, singularly or in combination, of operating a motor vehicle while under the influence of intoxicating liquor, or narcotic drugs in violation of paragraph (a) of subdivision (1) of section twenty-four; operating a motor vehicle recklessly or negligently so that the lives and safety of the public might be endangered; making a false statement in an application for a learner's permit or motor vehicle operator's license or in an application for registration of a motor vehicle; going away without making known his name, residence and the registration number of his vehicle after knowingly colliding with or otherwise causing injury to any person, other vehicle or property, all in violation of paragraph (a) of subdivision (2) of section twenty-four; operating a motor vehicle after suspension or revocation of the person's motor vehicle operator's license or his right to operate motor vehicles in violation of section twenty-three; operating a motor vehicle without a license in violation of section ten; or the commission of any felony in the commission of which a motor vehicle is used; or twelve or more convictions of offenses which are required by any provision of law to be reported to the registrar and for which the registrar is authorized or required to suspend or revoke the person's license or right to operate motor vehicles for a period of thirty days or more, including convictions of the offenses listed above.

. . . . . .

The registrar, after having revoked the license or right to operate

of any person under this section, shall not issue a new license or reinstate the right to operate to such person for a period of four years from the date of revocation, nor until such person has satisfactorily completed a driver improvement course approved by the registrar and has passed such examination as to his competence to operate motor vehicles as the registrar may require; provided, however, that such person may, after the expiration of one year, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the sole grounds of hardship, and the registar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. An appeal to the superior court may be had, in accordance with the provisions of chapter thirty A, from any order of the registrar of motor vehicles made under the provisions of this section.